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SUPREME COURT, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1960.

No. 497

JULIUS WILE SONS & CO., INC.,
Petitioner,

vs.

HARRY BRANDT, d b a UNIVERSITY CITY HOUSE OF LIQUORS, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

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Brown, Venue and Statute of Limitations, 1952 Antitrust Law Symposium 43 (CCH) 11

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Olney, Meeting the Impact of Antitrust Litigation in the United States District Courts, 1960 Antitrust Law Symposium 3 (CCH) 12, 13

Report of Judicial Conference Study Group on Procedure in Protracted Litigation, 25 F. R. D. 351, 355 (1960) 12

Report of Special Committee of Section of Antitrust Law of American Bar Association, "Streamlining the Big Case", 13 A. B. A. Antitrust Section Report 184 (1958) 11

Report of the Attorney General's National Committee to Study the Antitrust Laws, page 378 (1955) 11

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Respondents.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

Petitioner, Julius Wile Sons & Co., Inc., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the case named above on April 27, 1960.

OPINIONS BELOW.

The memorandum opinion of the District Court (R. I 46-50)[1] is not officially reported. The opinion of the Court of Appeals granting petitioner's motion to dismiss re-

[1] The printed record filed in this Court pursuant to Rule 21 (4) of the Rules of this Court is in three parts: the original Record on the first appeal to the Court of Appeals, No. 16,157 Civil (R. I.); the Supplemental Record on the same appeal (R. II); and the Record on the second appeal, No. 16,359 Civil (R. III), incorporating the two previous records by reference (R. III 9-10). Papers and proceedings in the Court of Appeals on the second appeal are cited "R. . . ."

spondents' first appeal (App. 33, infra) is reported at 269 F. 2d 14. The opinion of the Court of Appeals denying petitioner's motion to dismiss respondents' second appeal, and reversing the District Court's ruling (R. 4; App. 15, infra), is reported at 278 F. 2d 904.

JURISDICTION.

The judgment of the Court of Appeals (R. 21; App. 31, infra) was entered on April 27, 1960. A timely petition for rehearing or, in the alternative, for transfer to and consideration by the Court en banc (R. 23) was denied on July 25, 1960, without opinion (R. 44). The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTION PRESENTED.

Does a foreign corporation "transact business," and thereby subject itself to suit by any retailer who fancies a grievance under the antitrust laws, in every judicial district into which it ships its products, although it ships its products (f. o. b. its out-of-state plant) to only one or two wholly independent wholesalers located in the district, and although it does nothing whatever in the district?[2]

STATUTE INVOLVED.

The statute involved is Section 12 of the Clayton Act, 15 U. S. C., Section 22, which provides:

> Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.

---

[2] Petitioner also adopts the argument of petitioner James B. Beam Distilling Company in No. 475, October Term, 1960, with respect to the jurisdiction of the Court of Appeals, and desires to be heard on that issue if the Beam petition should be granted.

STATEMENT.

This petition arises out of the same litigation as the petition of Renfield Importers, Ltd., No. 458, October Term, 1960, and the petition of James B. Beam Distilling Company, No. 475, October Term, 1960. The proceedings below are identical, and the questions presented are the same.

1. The History of the Litigation.

This action was brought in the District Court for the Eastern District of Missouri by eighteen retail liquor dealers doing business in St. Louis, Missouri, and vicinity, against fourteen distillers, distributors, wholesalers and retailers of liquor for an injunction and treble damages for alleged violations of the Sherman Act, the Clayton Act and the Robinson-Patman Act. Service on petitioner was made in New York City (R. I 11). The complaint alleges that the defendants created a monopoly in the retail liquor business and that they conspired to monopolize and have monopolized the trade and commerce in the retail liquor business, and in the retail distribution of liquor in the City of St. Louis, Missouri, and vicinity (R. I 1).

Petitioner and two other defendants filed motions to dismiss for improper venue and for lack of jurisdiction over the person (R. I 20). These motions were duly argued, briefed and submitted, and the District Court thereafter sustained the motions and dismissed the case as to the petitioner and the two other defendant corporations. The District Court held that petitioner and the other two defendants were not transacting business in the Eastern District of Missouri within the meaning of Section 12 of the Clayton Act and so were not subject to suit there (R. I 46-50).

An appeal was taken from the orders of dismissal, but the United States Court of Appeals for the Eighth Circuit

dismissed the appeal. 269 F. 2d 14; App. 33, infra. The ground for dismissal was that the alleged cause of action was a single claim against multiple defendants, which did not permit an interlocutory appeal from the orders dismissing the cause as to only three of the fourteen defendants. Upon remand, respondents dismissed their complaint without prejudice as to all defendants except petitioner and the two other defendants which had already been dismissed (R. III 4). On the same day, the District Court issued an amended order striking from its previous order, which sustained the motions to dismiss, any reference to the finding of the District Court that the respondents asserted several claims rather than a single claim. The District Court ordered that the previous order otherwise remain in full force and effect as originally entered (R. III 5).

Respondents then took an appeal from the amended order, and sought review of the amended orders of dismissal as to petitioner and the other two defendants (R. III 6). The United States Court of Appeals overruled a motion to dismiss that appeal, and reversed the venue ruling of the District Court, holding that petitioner and the other two defendants were transacting business in the Eastern District of Missouri within the meaning of Section 12 of the Clayton Act (App. 15, infra). Petitioner now seeks review of that judgment of the Court of Appeals.

2. The Facts Bearing on the Question of Venue.

The material facts in this case are virtually identical with the facts set forth in the petition of Renfield, No. 458, October Term, 1960.[3] As in the Renfield case, the

[3] At no time in the litigation have respondents sought to distinguish between the business operations of Renfield, Beam, and Julius Wile. Thus, while it is true that petitioner (unlike Renfield) has an employee who spends approximately half his working time promoting good will toward petitioner in the Eastern District of

material facts are undisputed, and are set forth concisely in two affidavits filed in the District Court (R. I 22, 25). Petitioner is incorporated under the laws of New York. Its executive offices are located in the City of New York, and all stockholders' and directors' meetings are held in that city. Petitioner is engaged exclusively in the business of importing, blending, bottling and selling liquors, wines, and food specialties. In addition to its executive offices in New York, Julius Wile has only one other plant, a blending and bottling plant located in Peterboro, New Jersey. Petitioner has no offices, plants or warehouses outside the states of New York and New Jersey (R. I 26-27).

Petitioner is not now qualified nor has it ever been qualified to do business generally in the State of Missouri. It has no office, warehouse, plant, distillery or any kind of business operation, or any place for any kind of business operation, within the State of Missouri. It does not maintain an inventory or stock of goods in Missouri, neither owns nor rents property of any kind in Missouri, and has no bank account, transfer agent, registrar or registered agent for service of process in Missouri. It is not listed in any telephone directory or on any door or building directory in Missouri (R. I 27-28).

Petitioner makes no sales at retail to anyone in Missouri. Petitioner sells its products to two wholly inde-

Missouri (without authority to accept orders or make contracts) (R. I 28), respondents' counsel expressly asked the District Court to ignore this fact, stating in oral argument that "it is immaterial whether or not the company has an office, telephone, agent in the district" (Transcript of oral argument in District Court, June 15, 1958, p. 31; see also pp. 23, 27, 32; related in narrative form at R. I 42-45; material excerpts printed in Appendix, pp. 50-60, infra). Accordingly, the only question presented to the District Court, and the only question available for review on appeal, is the question presented at page 2, supra. See the argument directed to this point in Wile's petition for rehearing below, and cases cited therein, App. 42-47, infra. That question is, of course, the question necessarily decided by the Court of Appeals in reversing as to all three defendants.

pendent wholesalers located in the Eastern District of Missouri, only one of which resells to retailers in the Eastern District. These wholesalers are Pioneer Liquor Company, Inc. and Central States Wine Company, both originally named as defendants in the complaint below. Orders for petitioner's products are placed by Pioneer and Central States, and are received by petitioner at its offices in New York, subject to acceptance there. All goods are shipped f. o. b. New York, New Jersey or foreign port, and title passes to Pioneer or Central States at the time of shipment. All shipments are billed to Pioneer or Central States; payment is made by check mailed to and received at the offices of petitioner in New York. Petitioner has an out-of-state liquor license from the State of Missouri, which authorizes petitioner to sell in Missouri to wholesalers within Missouri, under Section 311.180 (6), Revised Statutes of Missouri, 1949, but petitioner has made no use of this license, for all of its sales are made outside of the state. Petitioner has no financial interest in, and exercises no control over, the operations of either Pioneer or Central States, and the only relationship that exists between petitioner and the two wholesalers is that of seller and buyer (R. I 27-28).

In the year 1957, the total goods sold by petitioner to the two wholesalers were sold at a price of $142,000.00, including tax (R. I 44). This was about 3½% of the total sales of petitioner in that year. Approximately 3/7 of such goods (or about 1½% of the total annual sales) were resold by Pioneer in the Eastern District of Missouri; the balance of such goods (about 2% of petitioner's annual sales) was resold by Central States elsewhere (R. I 28-29).

The foregoing Statement differs significantly from the "facts" referred to in the opinion of the Court of Appeals (App. 15, infra); an explanation of the difference is in order. With deference, petitioner submits that the court

below ranged outside the record for its "facts"; some of those "facts" are contrary to the undisputed facts of record, and others are such that counsel has not yet been able to verify them. In the interest of brevity, petitioner will refrain from documenting this explanation here, but will refer this Court to the documentation contained in petitioner's petition for rehearing below (R. 23-43; App. 48-58, infra). Judged by the record, the foregoing Statement will be found entirely accurate.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

Section 12 of the Clayton Act (15 U. S. C., Section 22) provides that plaintiffs may bring an antitrust action against a corporation "not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business." It is conceded that petitioner is not an inhabitant of the Eastern District of Missouri, and also that petitioner may not be found in that district. The only question before the District Court, therefore, was whether, under the undisputed facts, petitioner "transacts business" within the district.

The undisputed facts, as presented on the record below,[4] show no connection between petitioner and the Eastern District of Missouri, except that petitioner (like petitioners Renfield and Beam) sells goods outside the district to two wholesalers located in the district, and ships the goods to those wholesalers f. o. b. New York, New Jersey, or foreign port. On this bare record, the Court of Appeals has ruled that all three petitioners "transact business" in the district, within the meaning of the venue statute.

[4] Omitting from consideration the item which respondents urged the court to ignore as "immaterial". See note 3, p. 4, supra, and cases cited in petition for rehearing below, App. 43-45, infra.

1. The Decision Below Is in Conflict With the Applicable Decisions of This Court.

The leading case on the construction of this venue statute is **Eastman Kodak Co. v. Southern Photo Materials Co.**, 273 U. S. 359 (1927). In that case this Court pointed out that the Clayton Act had broadened the traditional concept of doing business, stating that

> "a corporation is engaged in transacting business in a district, within the meaning of this section, in such sense as to establish the venue of a suit—although not present by agents carrying on business of such character and in such manner that it is 'found' therein and is amenable to local process,—if, in fact, in the ordinary and usual sense, it 'transacts business' therein of any substantial character." 273 U. S. at 373.

The Court held that venue was properly laid,

> "since it appears from the facts already stated that the defendant, in a continuous course of business, was engaged, not only in selling and shipping its goods to dealers, within the Georgia district, but also in soliciting orders therein through its salesmen and promoting the demand for its goods through its demonstrators for the purpose of increasing its sales." Id. at 374.

In sum, this Court held that (1) the phrase "transacts business" should be construed in its ordinary and usual sense, and (2) the phrase requires something more than simply selling and shipping goods to dealers within the district. On both points, the decision below is in conflict.

The court below has construed the phrase "transacts business" in a most extraordinary and unusual sense, in holding that a corporation transacts business in Missouri by selling and shipping goods from New York. Any New York businessman would be shocked at the suggestion

that he is transacting business in the Eastern District of Missouri when he fills an order from his New York office, shipping the goods f. o. b. New York. If the ruling below stands, a businessman engaged in manufacturing products for a national market will be held to "transact business" in almost every district in the country, for he will have to sell to wholesalers located in various districts. Such an interpretation defies common understanding and common sense, and thereby conflicts with the interpretation approved in the **Eastman** case.

Further, in holding that the mere selling and shipping of goods into the district from outside the district constitutes the transaction of business within the district, the court below has rendered a decision in direct conflict with the ruling of the **Eastman** case. This Court held that Eastman was "transacting business" within the Georgia district because it **not only** engaged in selling and shipping its goods from outside the district to dealers within the district, **but also** engaged in soliciting orders therein through its salesmen and promoting the demand for its goods through its demonstrators for the purpose of increasing its sales. The court below has erroneously ruled that the activities apparently considered insufficient in the **Eastman** case are now sufficient to constitute the transaction of business in the district.

Subsequently, in **United States v. Scophony Corporation of America**, 333 U. S. 795 (1948), this Court restated its interpretation of the venue statute. The Court pointed out that, in enacting the Clayton Act, Congress selected "the practical and broader business conception of engaging in any substantial business operations". 333 U. S. at 807. Thus, the "practical, everyday business or commercial concept of doing or carrying on business 'of any substantial character' became the test of venue." Ibid. In upholding venue in that case, this Court again relied

upon the activities of the defendant's agents within the district. The decision below is directly in conflict with that interpretation of the statute; although any businessman, applying a practical, everyday business or commercial concept of doing or carrying on business of any substantial character, would unhesitatingly conclude that petitioners do not "transact business" in the Eastern District of Missouri, nevertheless the court below has adopted a fiction of transacting business in the district, based upon the transaction of business outside the district.

Thereafter, in **United States v. National City Lines, Inc.**, 334 U. S. 573 (1948), this Court traced in detail the legislative history of Section 12 of the Clayton Act. Again this Court pointed out that, in enacting the Clayton Act, Congress had sought to expand the traditional concepts of venue. 334 U. S. at 586. At the same time, this Court noted that several of the broader proposals in Congress had been opposed and defeated as going too far. Id. at 587.

> "They were rejected because the choice given was too wide, giving plaintiffs the power to bring suit and force trial in districts far removed from the places where the company was incorporated, had its headquarters, or carried on its business. In adopting Section 12 Congress was not willing to give plaintiffs free rein to haul defendants hither and yon at their caprice. 51 Cong. Rec 9466, 9467." Id. at 588.

Yet the decision below, in upholding venue wherever the defendant's products may be found in the hands of a wholesaler, permits plaintiffs to force a trial in a district far removed from the places where petitioners are incorperated, have their headquarters, or carry on their business. In establishing such a rule, the decision below conflicts with this Court's statement of the congressional purpose.

2. The Court Below Has Decided an Important Question of Federal Law Which Should Be Settled by This Court.

As Congressman Summers said in debating the bill which became the Clayton Act, "this matter of venue is one of the most important connected with the whole subject of antitrust legislation." 51 Cong. Rec. 9467, quoted in **National City Lines**, supra, 334 U. S. at 583, n. 20. Moreover, in the last two decades the question has taken on a far greater significance, for recently, "treble damage actions have descended upon industry like a swarm of locusts * * * When I last took count there were 144 separate treble damage actions pending against the motion picture industry in the United States, involving claims in excess of $330,000,000.00." Brown, Venue and Statute of Limitations, 1952 Antitrust Law Symposium 43 (CCH).[5]

Partly as a result of this increased volume of treble damage actions, businessmen, like the antitrust bar, are becoming "keenly aware of the tremendous costs in time and money * * * which are attendant upon the trial of the protracted case." Report of Special Committee of Section of Antitrust Law of American Bar Association, "Streamlining the Big Case," 13 A. B. A. Antitrust Section Report 184 (1958). And, like Congressman Summers, they are keenly aware of the danger of "blackmail" (51 Cong. Rec. 9467), in "giving plaintiffs the power to bring suit and force trial in districts far removed from the places where the company was incorporated, had its head-

[5] For other comment on the increasing volume of such litigation, see the Report of the Attorney General's National Committee to Study the Antitrust Laws, at page 378 (1955). For more recent statistics on the filing of private civil antitrust cases, indicating an annual average of 250 new suits in the last three years, see the Annual Report of the Director of the Administrative Office of the United States Courts: 1960 (Preliminary Edition), pages II-41 to II-43; 1959, pages 110-111; 1958, pages 92-94.

quarters, or carried on its busines[s]." **United States v. National City Lines, Inc.**, supra, 334 U. S. at 588.[8] The ruling below, overturning as it does the settled understanding of the phrase "transacts business," and opening the door to costly litigation in almost every district of the United States, is of the greatest concern to all persons engaged in producing goods for the national market.

Moreover, the increased volume of treble damage litigation has had consequences of especial significance to this Court, in exercising its responsibility of supervising the inferior federal courts. "It is this type of litigation which has, in a large measure, contributed to the congested calendars which have in turn reflected upon the administration of justice in the federal courts." Murrah, J., Opening Remarks in Proceedings of the Seminar on Protracted Cases, 21 F. R. D. 401 (1957). See also McLaren, Procedure in Private Antitrust Cases, id. at 440; Report of Judicial Conference Study Group on Procedure in Protracted Litigation, 25 F. R. D. 351, 355 (1960). A brief survey of the rapidly increasing backlog of antitrust litigation discloses that "obviously the courts are not meeting the workload of antitrust cases at the present time." Olney, Meeting the Impact of Antitrust Litigation in the United States District Courts, 1960 Antitrust Law Symposium 3 (CCH). The increase in the volume of such time-consuming litigation calls for clear guidance from this Court in ruling on such basic pretrial issues as venue. Beyond that, the ruling below may be expected to encourage the very "blackmail" cases envisaged by Congressman Summers, and thereby to impose massive demands upon

[8] See also remarks of Congressman Scott opposing a proposed amendment to the bill: "It is going to open the door wide to [illegible] grievances to business, if any man can go anywhere in the [illegible] States and institute his action, if he can obtain any colorable [illegible] and compel the business institutions of the country to [illegible] about . . . ." 81 Cong. Rec. 1467.

the time and energy of the district courts, in ruling upon pretrial motions and matters of discovery in cases which will never come to trial, and would never have been filed under the common understanding of the phrase "transacts business." Thus, the ruling below is of the greatest importance in the administration of the business of the district courts, and seriously undermines the considerable efforts made in the last decade to ease the burden of antitrust litigation on the district courts. See authorities cited by Olney, op. cit. supra, at 4-5.

The need for clarification of this question is especially important in the light of the varying results which have been reached by the inferior federal courts in recent years. See, for example, the numerous cases cited by the Court of Appeals, both upholding and denying venue (App. 29-30). Indeed, while (as far as petitioner's counsel can determine) no other court has reached a result so harshly in conflict with the common understanding of the concept of transacting business, it must be admitted that two other courts have rendered decisions which substantially support the ruling below, in contravention of the understanding generally accepted throughout the country since the decision of the **Eastman** case in 1927. **Green v. United States Chewing Gum Mfg. Co.**, 224 F. 2d 369 (C. A. 5, 1955); **Sunbury Wire Rope Mfg. Co. v. United States Steel Corp.**, 129 F. Supp. 425 (E. D. Pa. 1955).

If this ruling is to be the law of the land, it should be announced by this Court, so that the lower courts throughout the nation may know the law, so that the antitrust bar and the business community may understand the pitfalls ahead of them, and, finally, so that the Congress may remedy the situation by further amendment of the Clayton Act. If this ruling is not to be the law of the land, that fact also should be announced by this Court, in order that (1) the lower courts may know that they should continue

to apply the rule as it has been generally (albeit, perhaps, inconsistently) applied since the **Eastman** decision in 1927, and (2) "plaintiffs [may not have] free rein to haul defendants hither and yon at their caprice." **United States v. National City Lines, Inc.**, supra, 334 U. S. at 5[illegible].

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be granted.

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APPENDIX A.

Opinion of the Court of Appeals Reversing the Ruling of the District Court (April 27, 1960).

UNITED STATES COURT OF APPEALS
for the Eighth Circuit.

No. 16,359

Harry Brandt, d b a University City House of Liquors, et al., Appellants,

v.

Renfield Importers, Ltd., a Corporation, et al., Appellees.

Appeal from the United States District Court for the Eastern District of Missouri.

[April 27, 1960.]

Before Gardner, Woodrough and Blackmun, Circuit Judges.

Woodrough, Circuit Judge.

This action was brought by eighteen retail liquor dealers doing business in St. Louis, Missouri, and vicinity, against fourteen distillers, distributors, wholesalers, and retailers of liquor for injunction and treble damages for alleged violations of the Sherman Act, the Clayton Act, and the Robinson-Patman Act.

The complaint alleged that the defendants created a monopoly in the retail liquor business in violation of the anti-trust laws; that they had conspired to monopolize and have monopolized the trade and commerce in said liquor and the retail distribution thereof in St. Louis, Missouri, and vicinity.

The case was heretofore before this Court on an appeal by the plaintiffs from three orders entered by the District Court on November 20, 1958, which severally dismissed the case as to three defendant corporations, Renfield Importers, Ltd. (referred to as Renfield), James B. Beam Distilling Company (referred to as Beam), and Julius Wile Sons and Company (referred to as Wile), for improper venue and lack of jurisdiction over the person.

The plaintiffs contended on that appeal that the three defendants were "transacting business" in the Missouri judicial district where the suit was brought so that the venue was proper and as they were properly served at their principal places of business, the jurisdiction of the persons was complete. The three orders then appealed from each contained a provision and direction for the entry of a final judgment of dismissal of one of the three defendants in accordance with Rule 54 (b) of the Federal Rules of Civil Procedure. This Court was of the view that the action as disclosed by the complaint did not involve multiple claims within the purview of the Rule but rather a single claim of conspiracy joined in by all defendants and that the orders dismissing the three defendants were not final orders and therefore not appealable. It accordingly dismissed the appeal without consideration of the merits of appellants' contentions and remanded the case for further proceedings. 269 F. 2d 14.

After the mandate of this court was entered in the District Court and on August 6, 1959, the plaintiffs filed a voluntary nonsuit as to all the defendants in the case ex-

cepting Renfield, Beam, and Wile, and with approval of the Court, dismissals without prejudice were entered as to all defendants except the three. On the same day the Court in finally disposing of the action as to the remaining three defendants entered an order in which it referred to the mandate of this Court and to the three orders of dismissal which it had entered on November 20, 1958 in favor of the three defendants and after ordering that those former orders be amended so that the provision and direction based on Rule 54 (b) which it had included in those orders be stricken from them, ordered "the aforesaid orders and each of them in all other respects to remain in full force and effect as heretofore entered."

The plaintiffs have taken this appeal from that order of August 6 to obtain reversal of the dismissals of the case as to the three defendants and they contend that the Court erred in sustaining said defendants' respective motions to quash service of process and to dismiss the three defendants for improper venue and lack of jurisdiction of the person. They insist that each of the three defendants is transacting business in the Eastern Judicial District of Missouri within the meaning of 15 U. S. C. A., § 22 (§ 12 of the Clayton Act) and that venue is proper as to each and service at their respective place of business outside of Missouri where they were "found" was sufficient.

The appellee Beam has filed a motion to dismiss this appeal on the ground that the order appealed from is not a final order but we do not find the motion to be meritorious. Although the order of the District Court of August 6, 1959 does not repeat the express words of dismissal that were contained in its previous three orders of November 20, the reference the Court made to those orders and the declaration that the orders and each of them (as amended) were "to remain in full force and effect as heretofore entered" left no ambiguity or uncertainty about

the Court's final decision and judgment that the three defendants were not transacting business in the Missouri judicial district and that the case against them was dismissed for that reason. The entry of the order of August 6th afforded the plaintiffs their first opportunity to take a valid appeal from the ruling and order of the District Court dismissing the three defendants and they promptly filed Notice of Appeal. The Notice describes the orders referred to therein which are continued in effect thereby and clearly identifies the proceedings and judgment which the appellants claim to be erroneous. It establishes this Court's jurisdiction to review the dismissals.

The only question of merit in this appeal is whether the District Court erred in holding that the Renfield, Beam, and Wile corporations were not "transacting business" in the Missouri judicial district within the intendment of § 12 of the Clayton Act, 15 U. S. C. A., § 22. That section provides:

> Any suit, action, or proceeding under the anti-trust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.

The District Court in its opinion (unreported) briefly related the facts relative to the issue as they had been proved without dispute by affidavits of the officers and employees of the three defendants and counsel for appellants have not departed from but have somewhat amplified the Court's statement of facts in accord with the evidence and without dispute.

All three of the appellees are "foreign corporations" as to Missouri, the principal offices of Renfield and W[illegible]

being in New York, N. Y. and that of Beam being in Chicago, Ill. Each of them was served with process at its principal office. Each of them had an outstate liquor license for and issued to it by the Supervisor of Liquor Control of Missouri pursuant to 311.060 (6). The cost of the licenses is $250.00 annually. (311.180 (5).

As to the Beam Company. Its selling operations are centered at its main office in Chicago and it has no branch office of any kind in Missouri. It has selected and sells and ships its products to only two licensed distributors in the Missouri district, namely Conrad, Inc., and Manhattan Distributing Co., both of St. Louis, in neither of which does it have any financial interest. It receives its orders for Beam liquors from those distributors at its Chicago office and rejects them or accepts them and makes all deliveries against those accepted by delivering to carriers at its distillery or rectifying plant at Clarmont, Kentucky, f.o.b. that plant, thereby passing title to the goods in Kentucky. It has no stock of merchandise in warehouses or otherwise in Missouri, and no real or personal property there. It maintains a checking account in a St. Louis bank and has there pledged collateral for a loan. Deposits and checks to and from the account are sent from Chicago, where all advertising also is planned and prepared. Beam employs a detail man on a straight salary who resides in the district but has no office or company automobile or Beam stationery with his name on it, but visits retailer-customers of the distributors not on any regular schedule and without any incentive compensation based on sales. He carries no order blanks, has no authority to make sales, or to make adjustments, collections, or credits, and his sole function is promotional in nature, namely, to stimulate interest in Beam's products and to persuade retailers handling Beam's products to give them proper shelf space and display. He has no stock of samples or inventory. He is occasionally requested to make

notations of retailer's requisitions for Beam products and relays such requests to Beam's two distributors. Beam's vice president, Mr. Gertz, supervises the sale of Beam's products to distributors in thirteen states—calling on the distributors at irregular intervals—averaging once every other month on those in Missouri—not for the purpose of taking orders but if given an order by a distributor he transmits it to Beam's office at Chicago for acceptance and processing. Beam is not qualified under the general corporation statute to do business in Missouri as a foreign corporation and has not designated an agent for service of process there. No officer, agent, employee, or director of Beam maintains an office in the district and no officer or director resides therein and no stockholders' or directors' meeting has ever been held there. In 1957 Beam sold $446,000.00 worth of its products to its distributors in the Missouri district of suit, which was 0.7% of all Beam's sales in that year.

As to Renfield. In 1956 Renfield Importers, Ltd., sold $1,580,818.60 worth of goods to its distributors in the district of suit. In 1957, it sold $1,313,947.98 worth of its products in this district, all of which was to the two wholesalers in the district, namely, Conrad, Inc., and Paramount Liquor Company, Inc., who were Renfield's distributors.

During 1956, two per cent of its total volume was done in St. Louis and St. Louis County. In 1957, 1.72 per cent of its case total sales were shipped into the City and County of St. Louis.

Jack S. Birnbaum, vice president of Renfield, in his affidavit filed on behalf of said defendant, states that Renfield is incorporated under the laws of New York. It has never been qualified to do business in Missouri. It is engaged in the business of distributing various kinds of alcoholic beverages throughout the United States. The

sale of its products is conducted, through its general office in New York City and regional offices in Chicago, San Francisco, Atlanta, and Los Angeles. Renfield sells its products to wholesalers, state liquor control commissions, and to airlines, railroad, and other common carriers. It has no office, warehouse, plant, distillery, or any kind of business operation or any place for any kind of business operation within the State of Missouri. It does not maintain any inventory or stock of goods in this district, owns no property of any kind in Missouri; has no bank account, no transfer agent, registrar or registered agent for service of process in Missouri, has not designated anyone to act for it in Missouri. It is not listed in any telephone directory in Missouri, its name does not appear upon the door of any office or directory of any building in Missouri. It maintains no salesman, agent, or employee of any kind in Missouri. It sells its products exclusively to two wholesalers doing business in the district, to-wit, Conrad, Inc., and Paramount Liquor Company, Inc. Renfield has no financial interest in and exercises no control over the operations of any of said wholesalers. Title to products shipped to the wholesalers passes before delivery to Missouri.

Renfield's products are sold to its distributors in Missouri pursuant to customers' orders forwarded by the wholesalers to Renfield's Chicago office which in turn transmits them to the New York office where they are received and accepted, or forwarded by the wholesaler directly to the New York office.

Renfield's products sold pursuant to such orders are sold and shipped exclusively f.o.b. its warehouse, or foreign port of the distillery where the products are made or distilled, all of which are located outside of Missouri.

Renfield employs a Division Manager who operates out of its regional office in Chicago and is engaged in good-

will promotional activities in Minnesota, Indiana, North Dakota, South Dakota, Nebraska, Kansas, and formerly in Missouri, but neither such Division Manager nor any other employee has come into the Eastern District of Missouri or conducted any business activities there for about five years prior to the commencement of this action.

It has a Missouri Outstate Liquor Solicitor's License issued by the State of Missouri, which authorizes it to sell its products only to wholesalers, and not to retailers within the State of Missouri.

The executive offices are located in New York, N. Y. and stockholders' and directors' meetings are held there. The corporate books and records are kept there. The company maintains warehouse stocks of its products in New York City, Chicago, San Francisco, and Los Angeles.

As to Wile. Julius Wile Sons & Co., Inc., did $142,000,00 in sales in this district in 1957. The principal office of the Julius Wile Company is in New York; its other place of business is a plant in New Jersey. It sells to only two dealers in Missouri. All of the Julius Wile liquors which go to retailers in the Eastern District of Missouri are distributed by Pioneer Liquor Company, Inc. There are two ways these distillers sell to their wholesalers. In one the distiller pays the tax and sells at the price plus the federal tax. The other is to sell in bond, just pay for the products, and then when they get the product out of bond, they pay the government tax directly.

The sales are made f.o.b. New York and New Jersey. The Julius Wile Co. employs Richard D. Ruane, who resides in St. Louis County, to promote good will, and consumer and customer acceptance of Julius Wile's products in Missouri, Kentucky, Kansas, and part of Illinois. Pioneer distributes Wile's products in the Eastern Dis-

trict of Missouri and Central States distributes Wile's products in the Western District of Missouri. All sales of Wile's products to retailers and others in the State of Missouri are made either by Pioneer or by Central States. All orders by Pioneer or by Central States for Wile's products intended for re-sale in Missouri are forwarded to Julius Wile's offices at New York, either directly or through Ruane, by mail, telephone, or telegraph; the products so ordered are shipped to the respective places of business of Pioneer or Central States in the State of Missouri, as the case may be, f.o.b. New York, New Jersey, or foreign port. Pioneer and Central States are billed for all such products by, and make payment directly to, Julius Wile in New York by mail.

Ruane's duties in the district of suit are to maintain contact with Pioneer and Central States, to suggest methods of promoting good will toward, and consumer and customer acceptance of Wile's products. He does not carry order blanks. He has no authority to make or modify any contract with any wholesaler, distributor, retailer, person, firm, or corporation in the Eastern District of Missouri; he does not approve credits, nor make collections from Pioneer or Central States nor any customer of Pioneer or Central States.

In 1957, approximately [illegible] of Wile's products were sold by Pioneer in the Eastern District of Missouri. Wile maintains no stock of goods or inventory in Missouri, does not own or rent any property in Missouri. Ruane is the only employee of Wile in Missouri. He does not maintain an office or place of business in connection with his employment by Wile; Wile is not listed in any telephone book, nor on any door or building directory; Ruane is not listed; his salary and expense account are paid by check issued in New York and mailed to him in Missouri; he is required to make periodic visits throughout his terri-

tory in Missouri, Kentucky, Kansas, and part of Illinois. He does not spend more than fifty percent of his working time in connection with his duties in the Eastern District of Missouri.

Richard L. Blum, Jr., as President and Director, made an affidavit on behalf of Julius Wile Sons & Co., Inc., stating Wile is incorporated under the laws of New York, has never qualified to do business in Missouri; that Wile is duly licensed under § 311.180(6) of the Revised Statutes of Missouri, 1949, as an out-of-state corporation to offer intoxicating liquors for the sale only to or through duly licensed wholesalers in the State of Missouri. The company makes no retail sales in this district. The company has no interest in either Pioneer or Central States.

The sales Wile made to distributors in the district in 1957 amounted to $142,000.00.

All of the enumerated details of transacting business that the appellees do not engage in, in Missouri, are stressed by them to support their contention that they do not transact any substantial business in the district. The record clearly indicates, however, that in supplying their liquor to the district of suit they do not offend in any respect the requirements of the Missouri Liquor Control Law, R. S. Mo. 1949, Ch. 311. The appellants do not claim that the appellees have "agents" in Missouri directly carrying on the sale of appellees' products but their claim is that when appellees' business of selecting certain distributors in the district of suit and of selling their brands of liquor and causing them to be transported into the district to those distributors for distribution there "is judged in its totality" it must be concluded that they each do transact some substantial business in the district of suit. **Exhibitor's Service v. Abbey Rents**, 135 F. Supp. 112. They contend that each of the appellees is transacting business in the district in such a sense as to establish the venue

of the suit there although not present by agents carrying on business in such character and in such manner that each appellee is found therein, or is there amenable to local process—because each in fact in the ordinary and usual business or commercial sense transacts business there of substantial character. **Eastman Kodak Co. v. Southern Photo Co.**, 273 U. S. 359. Appellants refer to the declaration of the Supreme Court concerning venue in antitrust cases in **United States v. Scophony Corporation**, 333 U. S. 795, that "the practical, every day business or commercial concept of doing or carrying on business of any substantial character became the test of venue" and insist that the business of appellees fully meets that test. As particulars in which the business of appellees meets the test, the appellants point to (1) appellees' taking out licenses in the state and acting under them by selecting and dealing with certain wholesalers in the district as their exclusive vendees and distributors there and planning and providing advertising for solicitation of sales by and through them; (2) by maintaining their close, continuous, day-to-day business relations with their distributors, they, in practical concept, are transacting liquor business in the district; (3) the volume of the business of each appellee in the district is substantial.

(1) The Missouri Liquor Control Law prescribes the taking out of a license as a prerequisite to selling or offering for sale liquor in the state (§ 311.050) and the

> issuance of licenses to non-residents of Missouri or to "foreign" corporations for the privilege of selling to duly licensed wholesalers and soliciting orders for the sale of intoxicating liquors to, by, or through a duly licensed wholesaler within this state

of Missouri is expressly sanctioned by § 311.060(1). § 311.180 provides that:

No corporation shall sell or offer for sale intoxicating liquor within this state or solicit orders for the sale of intoxicating liquor within this state without procuring a license from the supervisor of liquor control authorizing them so to do. For such license there shall be paid to and collected by the director of revenue charges as follows: * * * (6) For the privilege of selling to duly licensed wholesalers and soliciting orders for the sale of intoxicating liquors of all kinds to, by, or through a duly licensed wholesaler within the state the sum of two hundred and fifty dollars.

Penalties are provided for violations by § 311.880.

A main object of Missouri's Liquor Control Law is the regulation of the peculiar traffic in the state and the issuance of licenses to the several classes of liquor dealers that take part in it is an important means to that end. The taking out of liquor licenses by appellees identifies them with the traffic in the state and subjects them pro tanto to the state's regulation. The requirement that they report all the sales they are making to and through their distributors in the district establishes direct and continuing transactions with the state officers as an integral part of their business operation. It certainly was not any matter of mere form or ceremony. On the contrary, it constitutes a transacting of business of far reaching importance related to all sales of their brands of liquor made for distribution in the district.

(2) Of course, it is not to be considered in isolation. As a closely related matter, appellees have each selected two licensed Missouri wholesale liquor dealers to distribute all of the liquor of their brands that is shipped into the district. The liquor control law prohibits the foreign corporations from setting up places of business and selling within the state. But it is not the object of the law to

exclude appellees' brands, only to stringently regulate the traffic. When the foreign corporation makes its selection of only one or two wholesaler dealers to be identified with its brands and to handle all its products in the district, perhaps for long periods of time, that also is a serious business transaction. The record does not include the contracts between appellees and their distributors, but it is evident that the relationships are close, intimate, and of long standing, and cover by expression or implication much more than mere isolated bargains of sale of such and such liquor at such and such a price. Beam sends its vice president and Wile sends an employee into the district to maintain personal good will contacts with the distributors, but Renfield has such relations with its distributors to which its sales amounted to $1,580,818.10 in 1956 and $1,313,947.98 in 1957 that it does not need to and does not send any employee into the district to call upon them.

Appellees stress that their distributors are independent contractors and such they may appear to be in the technical common law sense. But they are not independent like a casual customer would be who occasionally makes a purchase from a vendor. On the contrary, they are selected sole and exclusive distributors who apparently perform for the appellees every function of distributing appellees' products that agents hired and paid for the purpose could accomplish.

Although appellees have not presented the contracts covering their relations with their distributors, it is not to be assumed that exclusive distributorships which include the opportunity to sell in the important market of St. Louis and vicinity such great amounts of standard, nationally advertised goods as those here involved are entered into without some obligation, express or implied. Appellees show that their distributors perform their functions in order to earn a margin of profit between costs and

sales instead of wages, but there is no indication that appellees are not free to select other distributors in place of the present ones if they are so minded. We think that in every day business conception the district of suit served with appellees' products as it is, would be sharply contrasted with a district where appellees' products were not for sale or obtainable and where appellees transacted no business. The relations of the appellees with their distributors is too close and continuous for all the transacting of the business to be attributed in common understanding to the distributors and none to the appellees.

Again, advertising according to plan is a most important factor in the nationwide sales of the many millions of dollars worth of their products annually by appellees. They plan and supply the advertising in the district of the suit pursuant to the express provisions of their license from the state. It constitutes a costly and serious transacting of business and affects the sales so directly that it cannot be disregarded in judging whether in the totality of their operations the appellees transact business in the district.

(3) The large amounts of the sales made in 1957, $1,353,947.98 by Renfield, $446,000.00 by Beam, and $142,000.00 by Wile demonstrate that the business transacted was very substantial. That the sales constituted a very small fraction of the business carried on in all the districts throughout the country by each of the three appellees (1.72% as to Renfield, 0.7% as to Beam, and 1.5% as to Wile) is immaterial. **Green v. U. S. Chewing Gum Mfg. Co.**, 224 F. 2d 369; **Sunbury Wire Rope Mfg. Co. v. U. S. Steel Corporation**, D. C. E. D. Pa., 129 F. Supp. 425. But the amounts sold reflect the systematic, continuous carrying on of the business and the continuity of conduct and relationship between the suppliers of the goods and the distributors of them indicates cooperation and participation of both in transacting business in the area.

The appellees describe their nationwide sales as made to wholesalers and distributors in the different states and press the doctrine of independent contractor to the point that it might be concluded that they do not transact business in any state except at their home offices. But we think that position is contrary to the teaching of **Eastman Kodak Co. v. Southern Photo Materials Co.**, 273 U. S. 359; **Santa Cruz Fruit Packing Co. v. Labor Board**, 303 U. S. 453; **Green v. U. S. Chewing Gum Mfg. Co.**, 224 F. 2d 369; **Sunbury Wire Rope Mfg. Co. v. U. S. Steel Corporation**, 129 F. Supp. 425; **United States v. Scophony Corporation**, 333 U. S. 795; **Exhibitors Service Inc. v. Abbey Rents et al.**, 135 F. Supp. 112; **Naifeh v. Ronson Art Metal Works**, 111 F. Supp. 491; **Jeffrey-Nichols Motor Co. v. Hupp Motor Corp.**, 46 F. 2d 623; **Abrahams v. Bendix Home Appliances**, 96 F. Supp. 3; **Austad v. United States Steel Corporation**, 141 F. Supp. 437; **Yonce v. Miners Memorial Hospital Association**; 161 F. Supp. 178.

No point has been made concerning the service of process that was had upon the appellees if they were in fact transacting substantial business in the district of suit. The service was in the districts where they were inhabitants and were found. § 12 of the Clayton Act, 15 U. S. C. A., § 22.

The appellees have cited the following as illustrative cases in which a corporation's activities in a district were found not to constitute "transacting business": **Winkler-Koch Engineering Co. v. Universal Oil Products Co.**, 79 F. Supp. 77; **Lechler Laboratories v. Duart Mfg. Co.**, 35 F. Supp. 839; **Schiller v. Mit-Clip Co., Inc.**, 180 F. 2d 654; **Midwest Fur Producers Assn. v. Mutation Mink Breeders Assn.**, 102 F. Supp. 649; **Seaboard Terminals Corp. v. Standard Oil Co. of N. J.**, 104 F. 2d 659; **Reid v. University of Minnesota**, 107 F. Supp. 439; **Austad v. United States Steel Corp.**, 141 F. Supp. 437; **Hampton Theatres, Inc. v. Paramount Film Distributing Corp.**, 90 F. Supp. 645;

Windsor Theatre Co. v. Loew's Incorporated, 79 F. Supp. 871; **Commonwealth Amusement Enterprises, Inc. v. Colonial Theatres Co., Inc.**, 79 F. Supp. 763.

None of these cited cases appear to give substantial support to the position of appellees. In the case of **Austad v. United States Steel Corporation**, supra, the Court commented:

> Some aid may be derived from a consideration of the purpose which motivated Congress in providing the test of transacting business. In the **Scophony** case, the Supreme Court commented as follows on the effect of 15 U. S. C. A., § 22: "A foreign corporation no longer could come to a district, perpetrate there the injuries outlawed, and then, by retreating or even without retreating to its headquarters defeat or delay the retribution due." 333 U. S. at page 808.

In this case, the working arrangements between the licensed appellees and the licensed distributors they have selected to handle their liquor in St. Louis and vicinity is such that if so disposed they would have as good opportunity to "perpetrate the injuries outlawed" as if they had agents working for them in the area. The case therefore presents the situation the Supreme Court referred to in the **Scophony** case where the venue for suit against such foreign corporations is in the district where it is charged they have violated the Act.

The judgments of dismissal appealed from are reversed and the case remanded for further proceedings in accord with this opinion.

Reversed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX B.

Judgment of the Court of Appeals Reversing the Ruling of the District Court (April 27, 1960).

United States Court of Appeals
For the Eighth Circuit.

No. 16359

September Term, 1959.
Wednesday, April 27, 1960.

Harry Brandt, d b a University City House of Liquors, Frank C. Viviano, d b a Viviano Importing Company, Sam Zucker, d b a Case House of Liquors, Louis Fangmeyer, d b a Spencer's House of Liquors, Nathan Malnik, d b a Malnik Candy & Tobacco Shop, Louis Marcus, d b a Lou's News & Tobacco Shop, Caesar Venegoni, d b a Caesar's Package Liquors, Maurice Sabbath, d b a Sabbath's Liquor Headquarters, Ted's Stores, Inc., a Corporation, George Alexander and Lee A. Conklin, d b a St. Ann's Package Liquors and Mound City Package Liquors, Clifford Broughton, d b a Broughton's House of Liquors, Albert W. Roudman d b a The Seventeen-O-One Package Store, Natham Meyer, d b a Hi-Pointe Liquors, Ben Martin, d b a Ben Martin Liquor Store, William Sabbath, d b a Sabbath Package Liquors, Elmer Saul, d b a Saul's Liquors, Alfred Chotin, d b a Crown House of Liquors, Paul Koines, d b a T and T House of Liquors, Appellants,

vs.

Renfield Importers, Ltd., James B. Beam Distilling Company, a Corporation, and Julius Wile Sons & Co., Inc., a Corporation.

Appeal from the United States District Court for the Eastern District of Missouri.

This Cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Missouri and the Motion of appellee

James B. Beam Distilling Company to dismiss the appeal, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the Motion of appellee James B. Beam Distilling Company to dismiss the appeal be, and the same is hereby, denied.

It is further Ordered and Adjudged by this Court that the judgments of dismissal of the said District Court appealed from be, and the same are hereby reversed with costs; and that Harry Brandt, d b a University City House of Liquors, Frank G. Viviano, d b a Viviano Importing Company, Sam Zucker, d b a Case House of Liquors, Louis Fangmeyer, d b a Spencer's House of Liquors, Nathan Malnik, d b a Malnik Candy & Tobacco Shop, Louis Marcus, d b a Lou's News & Tobacco Shop, Caesar Venegoni, d b a Caesar's Package Liquors, Maurice Sabbath, d b a Sabbath's Liquor Headquarters, Ted's Stores, Inc., a Corporation, George Alexander and Lee A. Conklin, d b a St. Ann's Package Liquors and Mound City Package Liquors, Clifford Broughton, d b a Broughton's House of Liquors, Albert W. Roudman, d b a The Seventeen-O-One Package Store, Nathan Meyer, d b a Hi-Pointe Liquors, Ben Martin, d b a Ben Martin Liquor Store, William Sabbath, d b a Sabbath Package Liquors, Elmer Saul, d b a Saul's Liquors, Alfred Chotin, d b a Crown House of Liquors, Paul Koines, d b a T and T House of Liquors have and recover against Renfield Importers, Ltd., James B. Beam Distilling Company, a Corporation, and Julius Wile Sons & Co., Inc., a Corporation, the sum of Four Hundred Seventy-four and 36 100 ($474.36) Dollars for their costs in this behalf expended and have execution therefor.

And it is further Ordered that this cause be, and the same is hereby, remanded to the said District Court for further proceedings in accordance with the opinion of this Court this day filed herein.

April 27, 1960.

APPENDIX C.

Opinion of the Court of Appeals Dismissing First Appeal (July 15, 1959).

UNITED STATES COURT OF APPEALS
For the Eighth Circuit.

No. 16,157

Harry Brandt, d b a University City House of Liquors et al., Appellants,

v.

Renfield Importers, Ltd., a Corporation et al., Appellees.

Appeal from the United States District Court for the Eastern District of Missouri.

[July 15, 1959.]

Before Gardner, Chief Judge, and Johnsen and Vogel, Circuit Judges.

Gardner, Chief Judge.

This was an action brought by eighteen retail liquor dealers doing business in St. Louis, Missouri, and vicinity against fourteen distillers, distributors, wholesalers or retailers for certain alleged violations of the Sherman Anti-Trust Act, the Clayton Act, and the Robinson-Patman Act. The complaint alleged that the defendants created a monopoly in the retail liquor business in violation of the anti-trust laws; that they had conspired to monopolize and

have monopolized the trade and commerce in said liquors and the retail distribution thereof in St. Louis, Missouri and vicinity. The complaint also contained allegations as to damages claimed by the individual plaintiffs, for which they prayed judgment, including treble damages in the amount of $1,329,300.00 and costs, including reasonable attorney's fees, and for an injunction restraining the defendants and enjoining them from continuing said alleged violations of the anti-trust laws.

Three of the defendants, to-wit: Renfield Importers, Ltd., James B. Beam Distilling Co., and Julius Wile Sons & Co., Inc., each filed a motion to quash the service of process and to dismiss on the grounds of improper venue and lack of jurisdiction over the person. In resisting these motions plaintiffs contended that the court acquired jurisdiction because these three defendants (now appellees) were "transacting business" in the State of Missouri. The court heard these motions and on the proofs adduced sustained them and entered orders of dismissal as to the three defendants. Each of these orders of dismissal contains recital that:

> "The Court further directs the entry of a final judgment on the claim as to said defendant, which is only one of several claims, and enters this order upon an express determination that there is no just reason for delay and enters this order upon an express direction for the entry of judgment in accordance with Rule 54 (b) of the Rules of Civil Procedure."

From the orders so entered plaintiffs have appealed, seeking reversal on substantially the following grounds. The court erred in holding that the three appellees were not "transacting business" in the Eastern Judicial District of Missouri within the meaning of Sec. 22, Title 15, U. S. C. (Sec. 12 of the Clayton Act) because under the anti trust laws a corporation is engaged in transacting business for the purpose of venue, although it is not present by agent

carrying on the business, if in fact in the ordinary and usual sense it transacts business therein of any substantial character.

Simultaneously with the filing of their briefs, each appellee filed a motion to dismiss the appeal, with supporting brief, on substantially the following grounds. The order appealed from is not an appealable order in that, (1) the complaint in this case sets forth a single claim and does not set forth multiple claims, (2) the order appealed from does not dispose of the entire matter and is, therefore, not a final judgment, and (3) the order appealed from is not appealable under Rule 54 (b) of the Federal Rules of Civil Procedure because no more than a single claim for relief was presented in this action. These motions to dismiss the appeal were presented and argued by counsel for the respective parties in connection with the issues raised by appellants by their appeal.

Manifestly, if the motions to dismiss the appeal are well-founded, it should not be necessary to consider the merits of appellants' appeal and for that reason we shall first consider these motions.

The complaint charged the fourteen named defendants with combining and conspiring together in restraint of trade and commerce, which alleged restraint, it is charged, resulted in a monopoly. Plaintiffs demanded money judgment for treble damages in the amount of $1,329,360.60, for an injunction against the defendants, restraining and enjoining them from continuing the alleged violations of the Acts, and for costs and attorney's fees. By this complaint all of the fourteen defendants were charged as joint tort-feasors. There was no claim against any single defendant but they were charged with combining and conspiring together to commit the acts alleged to be violative of the anti-trust laws. The complaint was dismissed as to the appellees, not on the ground that they had not com-

bined and conspired with the other defendants, but because the court had not acquired jurisdiction over them, and the dismissal of the complaint on that ground confessedly would constitute no bar to an action against them on the same cause of action in a court which might acquire jurisdiction by proper service of process. The dismissal of the action as to appellees left undetermined the issues in the case, either as against them or the other defendants. It is a salutary rule, long adhered to by Federal courts, that, except where otherwise provided by statute, a cause of action must be treated as a unit, not triable piecemeal, nor appealable in fragments. **Arnold v. United States for Use of W. B. Guimarin & Co.**, 263 U. S. 427; **Hohorst v. Packet Co.**, 148 U. S. 262; **Standley v. Roberts**, 8 Cir., 59 Fed. 836; **Moss v. Kansas City Life Ins. Co.**, 8 Cir., 96 F. 2d 108; **Minnesota Min. & Mfg. Co. v. Technical Tape Corp.**, 7 Cir., 208 F. 2d 159; **Hunter v. Federal Life Ins. Co.**, 8 Cir., 163 F. 2d 192; **Brandt v. Renfield Importers, Ltd.**, 8 Cir., 226 F. 2d 206.

As early as 1894, in **Standley v. Roberts**, supra, the late Judge Walter H. Sanborn, speaking for this Court, said:

> "An order, judgment, or decree which leaves the rights of the parties to the suit affected by it undetermined—one which does not substantially and completely determine the rights of the parties affected by it in that suit—is not reviewable here until a final decision is rendered, nor is an order refaining or dismissing parties defendant, who are charged to be jointly liable to the complainant in the suit, appealable."

This rule has been consistently adhered to by this Court. Thus, in **Moss v. Kansas City Life Ins. Co.**, supra, it is said:

> "Considering the rules announced in the above cases, it would seem that the application of the above

rule announced in the **Rosenberg**, **Pesaro** and **Goldey** Cases should be limited to cases in which the void service of process attaches to all of the defendants. So construed, the rule is harmonious with the broad general rule that for an order, decree, or judgment to be final for appeal purposes such must completely dispose of the action."

The decisions of this Court are clearly in *harmony with* the views of the Supreme Court expressed in **Arnold v. United States for Use of W. B. Guimarin & Co.**, supra, where it is said:

"It is well settled that a case may not be brought here by writ of error or appeal in fragments; that to be reviewable a judgment or decree must be not only final, but complete, that is, final not only as to all the parties, but as to the whole subject matter and as to all the causes of action involved; and that if the judgment or decree be not thus final and complete, the writ of error or appeal must be dismissed for want of jurisdiction."

It is, however, contended by appellants that the orders dismissing the action as to the appellees for want of jurisdiction are appealable because the trial court, pursuant to Rule 54 (b), Federal Rules of Civil Procedure, directed the entry of a final judgment, "* * * upon an express determination that there is no just reason for delay and enters this order upon an express direction for the entry of judgment in accordance with Rule 54 (b) of the Rules of Civil Procedure." It is therefore necessary to consider the provisions of Rule 54 (b), Federal Rules of Civil Procedure. This Rule reads as follows:

"Judgment Upon Multiple Claims. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third party claim, the court may direct the entry of a final

judgment upon one or more but less than all of
claims only upon an express determination that th
is no just reason for delay and upon an express dir
tion for the entry of judgment. In the absence of s
determination and direction any order or other for
of decision, however designated, which adjudicat
less than all of the claims shall not terminate the a
tion as to any of the claims, and the order or oth
form of decision is subject to revision at any time b
fore the entry of judgment adjudicating all t
claims."

As has been observed, all of the fourteen defendants named in the action including the appellees were charged with a combination and conspiracy in restraint of trade in violation of the anti-trust laws of the United States. For this alleged violation of the law, plaintiffs sought a single judgment as damages. The rule authorizing appeals is, on its face, limited to one involving multiple claims. There may be said to be multiple parties plaintiff or multiple parties defendant, but there is involved only a single claim for damages alleged to have been suffered by reason of the combined action of the defendants constituting a conspiracy. We are of the view that this action did not involve multiple claims but rather a single claim, as disclosed by the complaint. **Sears Roebuck & Co. v. Mackey**, 351 U. S. 427; **Cold-Metal Process Co. v. United Engineering & Foundry Co.**, 351 U. S. 445; **Steiner v. Twentieth Century-Fox Film Corp.**, 9 Cir., 220 F. 2d 105; **Carr v. City of Anchorage**, 9 Cir., 235 F. 2d 780; **Luria Bros. & Co. v. Rosenfeld**, 9 Cir., 244 F. 2d 192; **Reagan v. Traders & General Insurance Co.**, 5 Cir., 255 F. 2d 845; **Lee v. Porcelain Patch & Glaze Corp.**, 5 Cir., 240 F. 2d 763; **Meadows v. Greyhound Corp.**, 5 Cir., 235 F. 2d 233; **Nettles v. General Accident Fire & Life Assurance Corp.**, 5 Cir., 234 F. 2d 243; **Hardy v. Bankers Life & Casualty Co.**, 7 Cir., 222 F. 2d 827; **District 65 v. McKague**, 3 Cir., 216 F. 2d

153; **Youpe v. Moses**, D. C. Cir., 213 F. 2d 613. In **Steiner v. Twentieth Century-Fox Film Corp.**, supra, plaintiff sought to recover judgment against seven defendants for alleged violations of the anti-trust laws. The action was dismissed as to six of the defendants and plaintiff sought to appeal as the trial court had certified under Rule 54 (b) that there was no just cause to delay an appeal by plaintiff from the judgments of dismissal. In the course of the opinion as to the appealability of the order of dismissal it is said, inter alia:

> "This judgment is not final. The appeal must therefore be dismissed without a consideration of the merits. Rule 54 (b) applies only to a case in which multiple claims are asserted by or against one or more parties. In the absence of multiple claims no final judgment can be entered under the Rule."

Construing Rule 54 (b), the Supreme Court in **Sears Roebuck & Co. v. Mackey**, supra, said in part:

> "The amended rule does not apply in a single claim action nor to a multiple claims action in which all of the claims have been finally decided. It is limited expressly to multiple claims actions in which 'one or more but less than all' of the 'multiple claims have been finally decided and are found otherwise to be ready for appeal."

The inherent nature of the cause of action cannot be changed by a trial court's certification that multiple claims are involved. The mere signing of the formula prescribed by Rule 54 (b) cannot, we think, have the magical effect of transforming a multiple parties action into a multiple claims action. As said in **Gold Seal Co. v. Weeks**, D. C. Cir., 209 F. 2d 802:

> "The fact that the motions judge, in the order sought to be reviewed, characterized the same as a

final judgment upon a separate claim can not make the order such a judgment or the claim such a claim if the claim fails to meet the standard of separateness or distinctness required by the law and the judgment fails to meet the standards of finality so required."

The appeal is therefore dismissed without consideration of the merits of appellants' contentions and the cause is remanded to the trial court for further proceedings not inconsistent with this opinion.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX D.

Petition of Appellee (Now Petitioner) Julius Wile Sons & Co., Inc., for Rehearing of Decision of Court of Appeals of April 27, 1960.

UNITED STATES COURT OF APPEALS
For the Eighth Circuit.

No. 16,359
Civil.

Harry Brandt, d b a University City House of Liquors, et al.,
Appellants,

vs.

Renfield Importers, Ltd.,
a Corporation, et al.,
Appellees.

Appeal from the District Court of the United States
For the Eastern District of Missouri.

Petition
Of Appellee Julius Wile Sons & Co., Inc., for Rehearing or, in the Alternative, for Transfer to and Consideration by the Court En Banc.

Comes now appellee Julius Wile Sons & Co., Inc., and for its petition for rehearing prays the Court to set aside or withdraw its opinion filed in this cause on April 27, 1960, and to grant this appellee a rehearing. Request is

also made, in the alternative, for a transfer to and consideration of this cause by the Court en banc for the reason that the opinion filed herein is contrary to long accepted principles, offends traditional notions of substantial justice, is of far-reaching consequences and is, therefore, of great importance not only to the litigants but to the bench and bar generally.

The petition for rehearing is sought because this Court, in its opinion filed herein, overruled (1) the theory upon which the case was presented in the court below, (2) the settled rule that the burden of proving jurisdiction under 15 U. S. C. 22 rests upon the plaintiffs, and (3) the facts as shown by the record in this case.[1]

1. The Court Overlooked the Theory Upon Which the Case Was Presented in the Court Below.

Commonly, the issue presented on a motion to dismiss for lack of jurisdiction under 15 U. S. C. 22 in an anti-trust proceeding is whether the defendant "transacts business" within the district of the suit by the sum total of all its activities within the district, including its advertising, its contractual or other relationships with persons within the district, and its participation through its agents in various activities within the district. However, presumably realizing that they were not able to make an adequate record on this issue, appellants in this case declined to present this issue, relying entirely upon a different theory—namely, the theory that one "transacts business" in the eastern district of Missouri merely by accepting purchase orders outside the district, shipping the merchandise f. o. b. New York addressed to a distributor in the district, and accepting payment outside the district.

[1] In the interest of brevity Julius Wile adopts appellee's views on the issue of appealability as expressed in the latter's [illegible] rehearing without discussing the question in this petition.

if the "dollar volume" of sales made in this manner is substantial.

This "dollar volume" theory was the only theory presented by appellants in the court below, and it was the only theory properly available to this Court on appeal. If appellants had sought, in their briefs or argument, to present the traditional theory of transacting business, rather than the "dollar volume" theory, appellees would have objected vigorously, and this Court should, and would, have rejected the argument as improper. As this Court stated only last year:

> "We have frequently held that an appellant cannot for the first time in an appeal raise an issue that was not presented to the trial court and upon which the trial court had no opportunity to pass." **Hartford Accident & Indemnity Co. v. Shaw**, 273 F. 2d 133, 140 (C. A. 8, 1959).
>
> "Appellant is bound by the theories of recovery advanced by her at the trial. Accordingly, this court will refuse to consider a question which is raised here for the first time on appeal and which was never presented to or passed upon by the trial court." **Gilby v. Travelers Insurance Co.**, 248 F. 2d 794, 797 (C. A. 8, 1957).
>
> "This court has frequently stated that on appeal the appellant must adhere to the theory upon which the case was tried in the court below, and that the appellant can not seek reversal upon a different theory than that upon which he tried the case below." **Green v. Dingman**, 234 F. 2d 547, 550 (C. A. 8, 1956).
>
> "The trial court having had no opportunity of passing upon the question now for the first time presented cannot be charged with error in failing to do that which it was not requested to do." **Weiss v. Duro Chrome Corp.**, 207 F. 2d 298, 300 (C. A. 8, 1953).

See also **Arkansas Valley Feed Mills, Inc., v. Fox De Luxe Foods, Inc.**, 273 F. 2d 804, 809 (C. A. 8, 1960).

In fact, however, appellants made no effort to change theories on appeal. On the contrary, appellants in their Brief on Appeal (in No. 16,157, adopted by reference on this appeal) reiterated that it "is wholly immaterial" whether the appellees even had a representative in the district, and that the sole criterion for transacting business, on appellants' theory, is "a substantial dollar volume." Brief 15, 16. Accordingly, this appellee has had no occasion to argue before this Court the issue of "transacting business" in the traditional sense, and, until now, has had no occasion to direct the attention of the Court to the authorities quoted above, concerning changing theories on appeal.

In evaluating the cumulative effect of all the supposed activities of the appellees in this district, this Court overlooked not only the rule concerning changing theories on appeal, but also the rule—even more fundamental—of "invited error." It is well settled that a party may not explicitly invite the trial court to follow a particular course of action, and thereafter complaint in the appellate court that the trial court erred in accepting the invitation. When an appellant makes such a complaint, this Court will refuse to entertain it. For example, in **Walton v. Chicago, St. Paul, Minneapolis and Omaha Ry.**, 56 Fed. 1006 (C. A. 8, 1893), the trial court had entered judgment for the plaintiff in a suit for personal injuries, and the defendant filed a motion to set aside the verdict, vacate the judgment, and grant a new trial. In the oral argument of the motion in the trial court, the plaintiff's attorney stated to the Court that the case "might as well be determined finally and at once; that a new trial, at most, would only result in cumulative testimony; and that, if the plaintiff had not introduced testimony sufficient to sustain a verdict

* * * he wanted to know it without the additional expense of another trial." Following this invitation, the trial judge declined to order a new trial, and entered a judgment for the defendant for lack of sufficient evidence to sustain a recovery. The plaintiff appealed. On appeal, this Court refused to consider whether the trial judge erred in failing to order a new trial. "It is a well-established doctrine that the parties to a suit must act consistently, and that they will not be heard to complain of errors which they have themselves committed, or have induced a trial court to commit." 56 Fed. at 1008. As this Court stated in **Mutual Benefit Health and Accident Ass'n v. Warrell**, 96 F. 2d 447, 450 (C. A. 8, 1938), "in such a situation, it would be a travesty to reverse the case for an error, even if it be an error, thus invited by counsel on both sides."

Yet that is just what this Court has done in this case, in attempting to evaluate the cumulative effect of all the supposed activities of the defendants in this district, rather than reviewing the ruling of the trial judge on the "dollar volume" theory. In arguing the motion to dismiss in the trial court, appellants' counsel repeatedly insisted that the activities of the defendants in the district were irrelevant, and that the only relevant factor was the "dollar volume." For example, he stated:

> "I do believe sincerely that when your Honor comes to read the decisions that I am going to cite that you will agree that a million and a half dollars a year business in this district is the doing of a substantial amount of business. That is the test in this case. Whether they have an agent he or not is wholly immaterial. They have nobody here (Tr. 23). * * * That is the test, and not whether they have an agent or they haven't an agent, or whether they do business on an f. o. b. basis. It is wholly immaterial as far as transacting business in that state is concerned

(Tr. 27). * * * [I]t is immaterial whether or not the company has an office, telephone, agent in the district, so far as transacting business in the district (Tr. 31). * * * Now, if your Honor please, in conclusion I simply say unless your Honor finds that a million and a half dollars of business a year isn't substantial, why then, I can't see how your Honor could find otherwise than that they are transacting business here, or a million three hundred thousand dollars, or even a hundred thousand dollars to my way sounds like a lot of money to me, may not to these distillers, because they do it in millions and millions all over the country, they're transacting business in this district, to that extent they are certainly transacting business, and as I say again, the fact whether they have an agent here is wholly immaterial—the Beam Company does have, but whether or not they have is immaterial. The question whether title passes is wholly immaterial (Tr. 31-32)."[2]

The case is entirely parallel with the **Walton** case, supra. Appellants' counsel expressly invited the trial court not to evaluate the cumulative effect of any supposed activities of the defendants in this district, and urged the Court to base its ruling solely on the "dollar volume" theory. If appellants had attempted to shift their ground on appeal, appellees would have directed the attention of this Court to the record, and to the rule of invited error. However, because appellants made no effort to shift their ground on appeal, appellees did not argue this point, and this Court has overlooked the rule; this Court has now based its decision on the cumulative effect of such sup-

[2] References to "Tr." are to the transcript of the oral argument before Judge Harper on the motions to dismiss on June 15, 1948, which is summarized in condensed form at R. 42-45. References to "R." are to the original record in No. 10,157, incorporated by reference in the record on this appeal.

posed facts as the agent who allegedly spends some time within the district.

In attempting to evaluate the supposed activities of the defendants within the district, this Court has inadvertently created further difficulties. Because appellants did not present this theory below, they presented no evidence of advertising in the district, or of the express provisions of the liquor licenses held by appellees, or of any supposed contracts between appellees and the local distributors, or of any reports that may be made by or required of appellees, or of any "working arrangements" between appellees and the local distributors. Accordingly, this Court thought it necessary to go outside the record in an attempt to infer such facts, and made several erroneous inferences. Furthermore, in assessing the blame for the supposed inadequacies of the record, this Court inadvertently reversed the burden of proof, improperly placing the blame upon appellees. These errors would have been avoided if this Court had confined itself to the single issue properly presented on the question of transacting business.

II. The Court Overlooked the Settled Rule That the Burden of Proving Jurisdiction Under 15 U. S. C. 22 Rests Upon the Plaintiffs.

At page 14 of the opinion, this Court stated as follows:

> "Although appellees have not presented the contracts covering their relations with their distributors, it is not to be assumed that exclusive distributorships which include the opportunity to sell in the important market of St. Louis and vicinity such great amounts of standard, nationally advertised goods as those here involved are entered into without some obligation express or implied."

Apparently, this Court thought it was important to consider the terms of the supposed contracts between ap-

pellees and the local distributors. The Court apparently believed that the burden of proof rested upon appellees, and, in the absence of evidence of the supposed contracts in the record, felt justified in drawing inferences adverse to appellees, and in relying upon such inferences in deciding this case.

In so doing, the Court overlooked the well established rule that the burden of proof of facts to support the jurisdiction of the court under 15 U. S. C., Section 22, rests upon the plaintiffs. **McManus v. Capital Airlines, Inc.**, 166 F. Supp. 301, 302 (E. D. N. Y., 1958); **Pfeiffer v. United Booking Office, Inc.**, 93 F. Supp. 363, 365 (N. D. Ill., 1950); see also **McNutt v. General Motors Acceptance Corp. of Indiana**, 298 U. S. 178, 189 (1936). Indeed, this point was explicitly conceded by appellants in their reply brief on the original appeal in this case, No. 16,157, at page 4.

It is respectfully submitted that the Court's ruling on burden of proof is contrary to the well settled law, as agreed upon by all parties to this litigation.

III. The Court Overlooked the Facts, as Shown by the Record in This Case.

In deciding an issue not presented by counsel in either Court, this Court thought it necessary to go outside the record in search of evidence bearing upon that issue. Thus, this Court, in making its decision, relied upon a number of "facts" which are not in the record. Many of these "facts" appear to be quite erroneous. None of these "facts," was considered or discussed by counsel in their briefs or argument. Most of these "facts" seem irrelevant even to the issue which the Court decided, and are so much the more irrelevant to the issue which was presented to the Court. In the following pages we shall point out some of the "facts" inferred by this Court, in the order in which they appear in the opinion.

1. At page 12 this Court stated:

> "The taking out of liquor licenses by appellees identifies them with the traffic in the state."

It is true that appellees have acquired out of state liquor licenses under Section 311.180, R. S. Mo. 1949, "for the privilege of selling to duly licensed wholesalers . . . ." but it is not true in any sense that the taking out of the licenses identifies appellees with the traffic in the eastern district, or even in the state. Such a license grants a "**privilege**" to engage in business in this state. A person will be identified with the traffic in the state, and "transact business" in the state, only if he **exercises the privilege.** This Court has overlooked the fact that jurisdiction under 15 U. S. C. 22 is determined by what business the defendant transacts in the district, and not by what business the defendant is privileged to transact in the district. **Cf. Chipman, Ltd. v. Thomas B. Jeffery Co.**, 251 U. S. 373 (1920).

2. On page 13, this Court stated:

> "The requirement that they report all the sales they are making to and through their distributors in the district establishes direct and continuing transactions with the state officers as an integral part of their business operation."

It is not clear what requirement the Court has in mind. Counsel for this appellee has found no reference to such a requirement anywhere in the record, the briefs, or the statutes. Presumably the Court had in mind Rule No. 9 of the Rules of the Supervisor of Liquor Control of Missouri, which provides that

> "Every distiller, rectifier, wine manufacturer, and wholesaler authorized to ship spirituous liquor and wine in this State, whether for sale herein or to be shipped outside thereof, shall, on or before the fifteenth (15) day of each month, make a report . . ."

"Said reports, when made by a licensee who has shipped spirituous liquor and wine into this State, shall show * * * the amount of spirituous liquor and wine **shipped or sold** to each wholesaler in this State . . ." (Emphasis added).

It is doubtful that the Court could take judicial notice of such a rule, even if the suggestion were timely. **Nabors v. United Realty Co.**, 298 S. W. 2d 474, 480 (St. L. Ct. App., 1957).

Presumably the Court is assuming that this Rule applies to appellees, although the parties have never briefed or argued either its applicability or its constitutionality. In doing so, the Court is relying upon an irrelevant factor. Assuming, arguendo, the applicability and constitutionality of this rule, it does not tend to show that appellees have done anything whatever in Missouri. It is inconceivable that the adoption by a Missouri official of a rule concerning monthly reports could in any way affect the concept of "transacting business" within the meaning of the Federal Anti-Trust Laws. Moreover, the requirement, if applicable, concerns the entire state of Missouri; it has nothing to do with the **eastern district**, as distinguished from the western district.

3. At page 13, the Court states:

"On the contrary, it constitutes a transacting of business of far reaching importance related to all sales of their brands of liquor made for distribution in the district."

The antecedent of the word "it" is not clear to counsel for this appellee. Presumably the Court intended to say that the making of monthly reports of liquor shipped into the State constitutes a transacting of business in the eastern district.

In that event, the Court has resorted to evidence not in the record. There is nothing in the record to show that any reports have ever been made. It may be that the so-called requirement is inapplicable or unconstitutional, or both, or that for some other reason reports have not been made. In assuming facts not in the record, the Court is reversing the burden of proof.

In any event, even if such reports are made, they are irrelevant, and cannot "constitute a transacting of business" in Missouri. If such reports are filed by appellee Julius Wile, they are presumably prepared and mailed in New York City, and could not constitute the transaction of business in the eastern district of Missouri, or even in the State of Missouri. Furthermore, such reports apparently must include all liquor shipped into the State, whether or not it is sold. We do not believe that this Court has intended to rule that the mere reporting of shipping of liquor into the State, without selling it, is the transaction of business within the State.

4. At page 13 the Court stated:

> "When the foreign corporation makes its selection of only one or two wholesaler dealers to be identified with its brands and to handle all its products in the district, perhaps for long periods of time, that also is a serious business transaction."

There is no evidence in the record that appellee Julius Wile has selected any dealer to handle all its products in the district for a long period of time. On the contrary, counsel for this appellee are reliably informed that Julius Wile merely fills purchase orders as they come in, in New York, and can refuse to fill them at any time.

In any event, it is respectfully submitted that this point is irrelevant. It may be assumed, arguendo, that the selection of such a dealer is a "serious" matter, but it must be

concealed that, if such a selection is made, it is probably made in New York, and not in the eastern district of Missouri. Accordingly, it cannot tend in any way to show that appellee Julius Wile is transacting business in the eastern district. On the contrary, it shows that Julius Wile has chosen to remain in New York, and sell from a distance to a Missouri distributor.

5. At page 14, the Court states:

> "On the contrary, they are selected sole and exclusive distributors who apparently perform for the appellees every function of distributing appellees' products that agents hired and paid for the purpose could accomplish."

With deference, we submit that this statement is sheer speculation, and is in part contradicted by the record. Nothing in the record shows what functions are performed by the "distributors" who purchase from appellees. Nothing in the record shows what functions could be performed by agents hired and paid for the purpose. There is no basis in the record for any such comparison.

Beyond that, the Court appears to be in error in stating that the distributors perform **for the appellees** every function of distributing. The record conclusively shows that whatever functions may be performed by Pioneer or Central States are performed for themselves, and not for appellee Julius Wile. The sworn statement of the president of Julius Wile, not challenged in any way by appellant, shows that Julius Wile sells outright to Pioneer and Central States; that Julius Wile has no interest in Pioneer or Central States, nor has any officer, director or stockholder of Julius Wile; that Julius Wile has no control over Pioneer or Central States or over their methods of doing business; that Julius Wile has no voice in determining to whom Pioneer or Central States will resell the products of Julius Wile or at what prices; that Pioneer's sales

men are not in any way controlled by or subject to direction by Julius Wile; and that Julius Wile approves no credits for, and makes no collections from, customers to whom Pioneer and Central States sell its products (R. 27-28). Is not this an emphatic, categorical, and specific denial of the statement quoted?

If it is true that the distributors sell liquor to retailers in this district, and that some of the liquor was purchased by the distributors from appellees, if that is all the Court intended to say, then the Court was correct. But in that case it would seem that the Court has failed to understand the issue of transacting business. The question is not whether liquor is being sold in Missouri to retailers by somebody; the question is, by whom? As Judge Nordbye said in **Midwest Fur Producers Ass'n v. Mutation Mink Breeders Ass'n**, 102 F. Supp. 649, 651 (D. C. Minn., 1951):

> "The act of publishing the advertisement and circulating the magazine in Minnesota as well as the other forty-seven states is performed by the publisher and his agents. The act of selling the furs and being of service to defendant's members is the act of the fur auction companies and their agents."

6. At page 13, the Court states:

> "The record does not include the contracts between appellees and their distributors, but it is evident that the relationships are close, intimate, and of long standing, and cover by expression or implication much more than mere isolated bargains of sale of such and such liquor at such and such a price."

At page 14, the Court states:

> "Although appellees have not presented the contracts covering their relations with their distributors, it is not to be assumed that exclusive distributorships which include the opportunity to sell in the important market of St. Louis and vicinity such great amounts

of standard, nationally advertised goods as those here involved are entered into without some obligation, express or implied. * * * The relations of the appellees with their distributors is (sic) too close and continuous for all the transacting of the business to be attributed in common understanding to the distributors and none to the appellees."

As pointed out above, the Court has here inadvertently reversed the burden of proof, improperly placing upon the defendants the burden of proving their relationship with the local distributors.

There is nothing in the record to demonstrate that these so-called relationships are "close, intimate, and of long standing." Whatever the relationship may be, it appears to counsel for this appellee to be more in the nature of distant, remote, and possibly of recent origin. Certainly the relationship is at least 900 miles distant.

Without any support in the record, the Court assumes that there are contracts between appellees and the local distributors, and jumps from that assumption to an assumption of the terms of the supposed contracts. There is nothing in the record to support these assumptions about any supposed contract or relations between Julius Wile and Pioneer or Central States. The record shows only that appellees, from time to time, accept purchase orders and ship merchandise. We submit that nothing more than that can reasonably be inferred.

7. At page 14, the Court states:

"Again, advertising according to plan is a most important factor in the nation-wide sales of the many millions of dollars worth of their products annually by appellees."

It is respectfully submitted that nothing in the record supports this statement, and the statement itself is, to

erroneous, at least debatable. If we were to indulge in guessing, we would guess that many items may very well be sold in substantial amounts with insignificant advertising. No one would seriously urge that this is a matter for judicial notice. In any event, the matter seems irrelevant.

8. At page 14, the Court states:

> "They (appellees) plan and supply the advertising in the district of the suit * * *."

This also, we respectfully submit, cannot be derived or interred from the record, as far as this appellee is concerned (although it may be true as to appellee Beam, see R. 39). As far as counsel for this appellee can determine, this statement is erroneous in fact. Counsel for this appellee understand that Julius Wile does not do any advertising in this district, and does not plan or supply advertising for any of the distributors or retailers in this district. If there is any substantial reason to question the accuracy of this statement, the matter should be resolved by a hearing in the district court. Finding no evidence in the record on appeal, ought not this Court to resolve any doubts against appellants, who carried the burden of proof?

9. At page 15, the Court states that advertising in the district is planned and supplied by appellees "pursuant to the express provisions of their license from the state." Counsel for the appellees have been unable to find any license in the record. The Court, of course, could not take judicial notice of such a license, even if the suggestion were timely. **Fireman's Fund Ins. Co. v. Wilburn Boat Co.**, 259 F. 2d 662, 664 (C. A. 5, 1958). Counsel have obtained from appellee Julius Wile a copy of a document purporting to be its license from the State of Missouri, being License No. 81, to expire on June 30, 1960; but counsel can find in that license no provision relating to advertising. Even if the license did contain such a pro-

vision, it would be irrelevant. The question which the Court is deciding (although the question is not properly before the Court) is what activities appellees have in fact engaged in in the eastern district of Missouri, not what might be required or permitted by a written document such as a license.

10. At page 15, the Court states:

> "It constitutes a costly and serious transacting of business and affects the sales so directly that it cannot be disregarded in judging whether in the totality of their operations the appellees transact business in the district."

The meaning of this sentence is not clear. Presumably the word "it" refers to advertising supposedly done or planned or supplied by appellees in this district. However, the record does not show that any advertising has ever been done, planned, or supplied by Julius Wile in this district. The only evidence which counsel for this appellee have found in the record relating to any advertising of any sort relates to advertising of appellee Beam, planned and prepared at Chicago (R. 39). Even that evidence does not indicate that any substantial amount of such advertising takes place. There is no evidence of cost or any other evidence from which the Court could conclude that even Beam's advertising "constitutes a costly and serious transacting of business and affects the sales so directly that it cannot be disregarded."

11. At page 15, the Court states:

> "[T]he continuity of conduct and relationship between the suppliers of the goods and the distributors of them indicates cooperation and participation of both in transacting business in the area."

The record shows nothing whatever about the relationship between the suppliers and the distributors except

that the suppliers fill purchase orders from time to time. In any event, the continuity of this conduct is irrelevant; the continuity of sales made in New York, shipped f. o. b. New York, cannot begin to show participation in the transacting of business in Missouri.

12. At page 17, the Court states:

> "In this case, the working arrangements between the licensed appellees and the licensed distributors they have selected to handle their liquor in St. Louis and vicinity is such that if so disposed they would have as good opportunity to 'perpetrate the injuries outlawed' as if they had agents working for them in the area."

As pointed out above, there is nothing in the record to show any "working arrangements" between appellees and the local distributors. On the contrary, we respectfully submit that the record affirmatively demonstrates that the Court's conclusion is erroneous. As shown at page 12, *supra*, Julius Wile sells outright to Pioneer and Central States, and has no part in any activities of those two distributors. How then could Julius Wile "perpetrate the injuries outlawed"?

IV. Conclusion.

In taking up an issue not presented in this case, expressly disclaimed by appellants, the Court has gone astray. Without a record, briefs or argument directed toward that issue, this Court has been obliged to resort to untenable inferences and assumptions, and has inadvertently reversed the burden of proof. With deference, but equally with earnestness, we submit that the Court has:

1. Taken up an issue not presented, and not properly available to the Court;

2. Based its decision on "facts" outside the record, many of which are probably erroneous;

3. Misplaced the burden of proof;

4. Misunderstood the issue taken up, relying principally upon "facts" which are irrelevant; and

5. Decided the issue erroneously.

The result is a grave miscarriage of justice and in essence a denial of due process of law. Even if the supposed "facts" were all accurate, and even if they were all matters of which the courts might take judicial notice, the court would still deny due process of law by taking judicial notice of such "facts" retroactively, after the case had been submitted, preventing appellees from disputing such "facts" by evidence or argument. **Ohio Bell Telephone Co. v. Public Utilities Comm'n**, 301 U. S. 292, 302 (1937). For these reasons it is respectfully submitted that this Court should order a rehearing of this case.

Respectfully submitted,

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Attorneys for Appellee, Julius Wile Sons & Co., Inc.

The undersigned, Lewis C. Green, counsel of record for the Appellee, Julius Wile Sons & Co., Inc., states that he has participated in the preparation of the foregoing petition for rehearing, and that the same is submitted in good faith and believed by him to be meritorious.

.....

APPENDIX E.

Excerpts From Transcript of Argument of Motion to Dismiss Before District Court (June 13, 1958).

(Reported in narrative format at R. I. 42-45.)

"[Mr. London, for plaintiffs-respondents:]

"[fol. 23] Now, before I go into the decisions that govern this case, I want to advert very briefly to the fact that this matter has been argued before Judge Moore. I have the utmost respect for Judge Moore, as you know, I think very highly of him, but he does make mistakes, and he has been reversed. That is neither here nor there. It is a question of whether he is right or wrong. Your Honor may differ with him, your Honor may agree with him, I don't know, but I do believe sincerely that when your Honor comes to read the decisions that I am going to cite that you will agree that a million and a half dollars a year business in this district is the doing of a substantial amount of business. That is the test in this case. Whether they have an agent here or not is wholly immaterial. They have nobody here.

I've got a case here, the Green case, which is cited by the Fifth Circuit Court of Appeals, in which they had no representative; they conducted all of their business by mail, and they only did $25,000 a year, and the Circuit Court of Appeals for the Fifth District said that is a substantial quantity of business, and they refused to dismiss the case, or to quash the service.

"[fol. 27] Your Honor will find when you read the decisions that I cite that the cases hold that the amount or size is immaterial. The question is what is substantial business as found or as felt by a reasonable man, businessman[illegible]

That is the test, and not whether they have an agent or they haven't an agent, or whether they do business on an f. o. b. basis. It is wholly immaterial as far as transacting business in that state is concerned. * * *

"[fol. 30] Now, they hold in these cases that the quantum necessary to support venue in anti-trust cases is less, and [fol. 31] is less necessary to support process than in other cases, so it is immaterial whether or not the company has an office, telephone, agent in the district, so far as transacting business in the district; nor is the place where title passes material where a substantial business is transacted within the judicial district. * * *

"Now, if your Honor please, in conclusion I simply [fol. 32] say unless your Honor finds that a million and a half dollars of business a year isn't substantial, why, then, I can't see how your Honor could find otherwise than that they are transacting business here, or a million three hundred thousand dollars, or even a hundred thousand dollars to my way sounds like a lot of money to me, may not to these distillers, because they do it in millions and millions all over the country, they're transacting business in this district, to that extent they are certainly transacting business, and as I say again, the fact whether they have an agent here is wholly immaterial—the Beam Company does have, but whether or not they have is immaterial. The question whether title passes is wholly immaterial on the question whether they are transacting business here. * * *"